Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOSE RUIZ,

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1) What is the quantity and quality of evidence that a Federal Employers' Liability Act plaintiff must generally produce in order to withstand a defendant's motion for summary judgment?

2) Is the quantity and quality of evidence that a Federal Employers' Liability Act plaintiff must generally produce in order to withstand a defendant's motion for summary judgment greater when the issue is whether the railroad worker was injured while "employed" in commerce?

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JURISDICTIONAL STATEMENT

Respondent's motion for summary judgment was granted by the Second Judicial District Court of Weber County, Utah, pursuant to its ruling dated January 11, 1994 and its order dated January 27, 1994. Appendix A. The judgment was affirmed by decision of the Utah Court of Appeals filed February 1, 1996. Appendix B. Petitioner's petition for writ of certiorari was denied by the Utah Supreme Court on May 29, 1996. Appendix C.

The statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment in question is 28 U.S.C. section 1257(a).

APPLICABLE STATUTE

The applicable statute, codified as 45 U.S.C. section 51, is reproduced verbatim as Appendix D. In relevant part, with emphasis added, it provides that:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce* . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . track, roadbed, works . . . or other equipment.
>
> Any employee of a carrier, *any part of whose duties as such employee shall be the furtherance of interstate . . . commerce; or shall, in any way*

> *directly or closely and substantially, affect such commerce* . . . shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act. . . .

STATEMENT OF THE CASE

A. Material Facts

1) Petitioner was a maintenance of way worker employed by respondent and assigned to an "extra gang" working out of Montello, Nevada. (R. at 252-53, 321-22, 418).

2) Respondent provided transportation by truck for the extra gang members from Montello to its work sites. (R. at 167, 288, 304).

3) On the date of the accident, when the crew was to fix railroad tracks at Lakeside, Utah, pursuant to permission from his foreman, petitioner was allowed to drive his own vehicle to the work site so that he could drive from there directly home to Ogden, Utah for the weekend. (R. at 167, 288, 431).

4) The extra gang members traveling in respondent's truck from Montello to Lakeside on May 18, 1990, were considered to be on-duty and were paid overtime from 5:00 a.m. until 7:00 a.m. for the two-hour commute. (R. at 167, 260, 287, 293, 314, 414).

5) Petitioner's foreman testified by affidavit that petitioner understood he would not be compensated for

the trip but that it was worth giving up the pay to get home earlier. (R. at 167).

6) At about 5:00 a.m. on May 18, 1990, petitioner was dressed for work and advised his foreman that he would be right behind the truck and that they would meet at Lakeside. (R. at 311-13).

7) Petitioner was injured while driving his private vehicle from Montello in a rollover accident approximately 14 miles from the work site at Lakeside while on a private gravel road owned and maintained by defendant which ran parallel to the railroad tracks. (R. at 7, 166-68, 287, 395).

8) Petitioner suffered a severe head injury from the accident, has been adjudicated mentally incompetent because he functions at the level of a three year old, was not capable of participating in a deposition and was unavailable as a witness. (R. at 283-84).

B. Federal Questions Raised in State Courts

Because this case arises under the Federal Employers' Liability Act (FELA), federal law governs. *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1917). Accordingly, FELA precedents were cited and argued to the state trial and appellate courts.

The federal authorities were first cited by petitioner in his trial court opposition to respondent's motion for summary judgment. See Appendix E. Additional FELA authority was extensively discussed in petitioner's brief

to the Utah Court of Appeals. The summary of argument in that brief is included as Appendix F.

ARGUMENT

A. As to Each Question Presented the Decisions Conflict

The first question presented for review deals with the evidentiary requirements imposed upon FELA plaintiffs in general to withstand a motion for summary judgment. The second question presented deals with those evidentiary requirements when a railroad moves for summary judgment specifically on the basis that the injury of its employee did not occur while the employee was "employed" in commerce, the statutory requirement to qualify for benefits.

The decisions on each question are in conflict as is demonstrated by a Sixth Circuit opinion filed the day after the Utah Supreme Court denied petitioner's writ of certiorari in this case.

In *Aparacio v. Norfolk & Western Ry. Co.*, 84 F.3d 803 (6th Cir. 1996), the court reviewed the general evidentiary standard required of an FELA plaintiff in order to withstand a defendant's motion for judgment as a matter of law. Because the federal summary judgment standard "mirrors the standard for a directed verdict," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), that review by the Sixth Circuit is applicable here.

In the background of that review were two tests set forth by this Court to determine when the issue of railroad negligence must go to the jury in FELA cases. The latter of the two cases stated the test as follows:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506 (1957).

The earlier case had held in part that:

> The weight of the evidence . . . must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . . . *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943).

In *Aparacio* the Sixth Circuit noted that this Court has not since *Rogers* "defined in a more precise manner the quantum of evidence" requirement for an FELA plaintiff. *Aparacio*, 84 F.3d at 809. The Sixth Circuit went on to note the varying standards that have been embraced by the various circuits as follows:

Seventh Circuit, "slight negligence," *Harbin v. Burlington Northern R.R. Co.*, 921 F.2d 129, 131 (7th Cir. 1990);

Ninth Circuit, "not outside the possibility of reason," *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995);

Fourth Circuit, "substantial evidence," *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 248 (4th Cir. 1994);

Third Circuit, "more than a scintilla of evidence," *Gill v. Pennsylvania R.R. Co.*, 201 F.2d 718, 720 (3d Cir.) *cert. denied*, 346 U.S. 816 (1953).

The Sixth Circuit then held that:

> *Brady* and *Rogers* require a Federal Employers' Liability Act plaintiff to present more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more. *Aparacio*, 84 F.3d at 810.

Just as the general question presented for review demonstrates varying evidentiary standards within the United States Court of Appeals, the more specific question presented for review has had varying standards defined.

Consistent with its response to the general question presented here for review, the Sixth Circuit states as follows:

> A plaintiff must present more than a scintilla of evidence to prove that (1) an injury occurred while the plaintiff was working within the scope of his or her employment with the railroad [and] (2) the employment was in furtherance of the railroad's interstate transportation business . . . . *Aparacio*, 84 F.3d at 810.

The Seventh Circuit concludes differently. In *Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 841 F.2d 1347 (7th Cir.), *cert. dismissed*, 487 U.S. 1244 (1988), the court rejected plaintiff's argument that the scope of employment definition should be tested by the "justify with reason" standard used by this court in *Rogers*. Contrary to the recent approval in *Aparacio* of the special

FELA "more than a scintilla" standard, the Seventh Circuit determined that the traditional summary judgment standard governed whether a railroad employee's injury "was actually 'work-related.' " *Wilson*, 841 F.2d at 1353.

This division of the federal courts finds a counterpart at the state level. In *Turpin v. Chicago, Burlington & Quincy R.R. Co.*, 403 S.W. 2d 233, 237 (Mo.), *cert. denied*, 388 U.S. 1003 (1966), the court rejected plaintiff's argument that under the FELA decisions, the employment issue, like the negligence and causation issues, should be submitted to the jury on "any evidence 'even the slightest . . . . ' " However, sixteen years later in the same state, a court revisited the issue.

In the later case a railroad argued in support of its motion for directed verdict "that plaintiff's burden of making a submissible case on the employment issue required more proof than the 'scintilla' of evidence commonly referred to in FELA cases." *Vinyard v. Missouri Pac. R.R.* 632 S.W.2d 272, 276 (Mo. App.1982). The court responded to the argument as follows:

> We have read the cases cited in *Turpin* and do not see plaintiff's burden on the employment issue as clearly defined as our Supreme Court did. For our purpose here, however, we assume plaintiff had the burden of showing his employment by the railroad by a preponderance of the evidence rather than a scintilla of the evidence. *Id.* at 277.

The court then held that plaintiff had satisfied his burden on the preponderance standard. *Id. at 277.*

It is understandable in light of the prior Missouri Supreme Court ruling that the Missouri Court of Appeals would apply the higher preponderance of evidence standard used to instruct juries in civil cases. The problem, however, is that courts which do not sit as triers of the facts are required to use a different standard in evaluating motions for judgment as a matter of law, whether the motions are presented as a request for summary judgment or otherwise.

In the quest for definition of the appropriate FELA standard for evaluating any motion for judgment, the Sixth Circuit has recently applied this Court's summary judgment analysis set forth in *Anderson*, 477 U.S. at 254, to confirm

> that the district court must view the evidence through the "prism of the substantive evidentiary burden" when deciding summary judgment motions, "bearing in mind the actual quantum and quality of proof necessary to support liability" under the substantive law. *Basinger v. CSX Transp., Inc.*, 1996 U.S. App. LEXIS 19139 (6th Cir. July 16, 1996).

Using the prism of the lesser evidentiary standard on the issues of negligence and causation, the Sixth Circuit then affirmed the district court's order granting summary judgment to the railroad. Because employment was not an issue, the court had no need to apply the prism to that issue under the "more than a scintilla of evidence" analysis described as appropriate for the employment issue in *Aparacio*, 84 F.3d at 810.

The conflicting analyses that have arisen in FELA since this Court's 1957 *Rogers* opinion and the related

questions arising from the application of *Anderson* to FELA cases have compounded the confusion otherwise evident in the FELA cases dealing with motions for summary judgment or for other procedural remedies which seek to avoid or overturn jury verdicts. The next section will provide an overview of that confusion. Because the case which brings this petition to the Court deals with the employment issue, the overview will be limited to that issue.

B. There Is No Well-Defined Summary Judgment Standard for the "While Employed In Commerce" Statutory Test

This Court long ago determined that the issue of whether a railroad worker was employed in commerce is generally for the jury. See *North Carolina R.R. Co. v. Zachary*, 232 U.S. 248, 260 (1914) (evidence "was sufficient" for jury determination); *New York Central & Hudson River R.R. Co. v. Carr*, 238 U.S. 260 (1915) (verdict affirmed).

This Court also provided guidance long ago as to the words "employee" and "employed" contained in the statute. *Robinson v. Baltimore & Ohio R.R. Co.*, 237 U.S. 84, 94 (1915) (used "in their natural sense, and intended to describe the conventional relation of employer and employee").

Prior to a statutory addition in 1939 (Appendix D, second paragraph), whether an employee was engaged in commerce at the time of the injury was an on-going issue for the courts. This Court provided guidance in *Carr*, 238 U.S. at 263-64:

> Each case must be decided in the light of the particular facts with a view of determining whether, at the time of the injury, the employee is engaged in interstate business, or in an act which is so directly and immediately connected with such business as substantially to form a part or necessary incident thereof.

In 1959 this Court dealt with the terms "employee" and "employed" in the context of whether the railroad defendant was the employer of the injured worker or whether another entity was the employer. *Baker v. Texas & Pac. Ry. Co.*, 359 U.S. 227 (1959). In that setting the Court utilized the Restatement of Agency to expand upon *Robinson*. In the face of conflicting evidence at trial, the Court reversed the holding below that the employment issue was properly decided by the trial judge in favor of the railroad as a matter of law. The choice "from among conflicting inferences and conclusions" was for the jury. *Baker* at 229.

This Court again faced the "employee" issue, also in the setting of which of two entities was the employer, in *Ward v. Atlantic Coast Line R.R. Co.*, 362 U.S. 396 (1960). The Court again referenced the Restatement of Agency factors and held that the "employee" issue "is one for determination by the jury on the basis of all the relevant factors." *Id.* at 400.

The issue resurfaced, again in the setting of which entity was the employer, in *Kelley v. Southern Pac. Co.*, 419 U.S. 318 (1974). The Court focused on the full statutory phase "while he is employed," reviewed many federal and state cases and ultimately remanded the case. Noted again was the Restatement of Agency as "instructive"

whether the issue is a bilateral master-servant or independent contractor relationship or is a three-party relationship between two employers and a worker. *Id.* at 324. Because all issues had been tried to the court (*id.*, 486 F.2d 1083, 1084 (9th Cir. 1973)), jury resolution was not an issue.

This Court has not directly held that the Restatement of Agency factors offer guidance for determination by a jury on the bilateral issue of whether a railroad employee fits within the statutory terms "employee" and "employed." The inference, however, is certainly there based upon the *Baker, Ward* and *Kelley* trilogy. Under the analyses of those cases and of the Restatement of Agency, when there is conflicting evidence, the inferences and conclusions are for the jury. See *Baker* at 229.

However, the problem in terms applicable to this case and to summary judgment cases in general is to determine whether disputes over facts are genuine and whether those facts are material so that they "might affect the outcome of the suit under governing law [and] properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

If the underlying substantive issue is determined by a jury applying a series of factors, summary judgment will never be appropriate when a dispute over material facts is genuine and is supported by evidence. Thus, when the "employee" "employed" FELA issue is before the court on a railroad employer's motion for summary judgment or an equivalent procedural motion, the court's only task is to determine the materiality of the disputed

facts, the genuiness of the dispute and whether there is evidence to support the non-moving party.

This analysis brings us full circle, however. The question remains: How much evidence and what kind of evidence? Whether the standard is "more than a scintilla, . . . but not much more" (*Aparacio*, 84 F.3d at 810) or some other standard, the trial court's role is limited. Certainly, the judge is not "to weigh the evidence and determine the truth of the matter . . . . " *Anderson*, 477 U.S. at 249. Neither is it the court's role to choose "from among conflicting inferences and conclusions . . . . " *Baker*, 359 U.S. at 229.

With that background we can examine what the courts actually did in the case which generated this petition and in the two federal cases upon which the Utah Court of Appeals relied.

C. The Courts Below Did Not Adhere to the Summary Judgment Standard Properly Derived From This Court's Opinions

Forty-four years ago this Court granted the petition for a writ of certiorari to the Tenth Circuit filed by the administrator of a deceased railroad worker. Five months later the petition was dismissed pursuant to stipulation of counsel. The issue raised by that case has not since been resolved by this Court or by any other court. That Tenth Circuit case is the first of the two cases cited by the Utah Court of Appeals.

The case was *Atchison, Topeka & Santa Fe Ry. Co. v. Wottle*, 193 F.2d 628 (10th Cir.), *cert. granted*, 343 U.S. 963,

cert. dismissed, 344 U.S. 850 (1952). It was a "scope of employment" case, tried to the court, with the material facts bearing on the "on duty" issue not in dispute.

The facts of the case turned on the application of the "necessary incident" criterion set forth by this Court in *Carr*. The Tenth Circuit majority, without reference to the 1939 FELA amendment which provided a statutory definition not including "necessary incident" (see Appendix D), noted that "[t]he difficulty arises, as always, in drawing the dividing line in the twilight zone." 193 F.2d at 630.

The trial court, acting as a fact-finder, had found that the deceased was acting within the scope of employment. The Tenth Circuit majority drew the line at a different place and reversed. Factually, the issue concerned an after-duty hours injury. To the majority, the FELA

> obviously does not cover activities undertaken by an employee for a private purpose and having no causal relationship with his employment. . . .
>
> Obviously, the legislation was not intended to go so far. *Id.* at 630, 631.

To the dissenting judge, referencing adjudications by this Court and the courts of appeal, it was not so obvious:

> [I]t seems reasonably clear to me that at the time of the accident the deceased was engaged in an act which constituted a necessary incident to his employment in commerce within the intent and meaning of the Act. . . . " *Id.* at 631.

Apparently acting under the "clearly erroneous" standard for reversing a trial court's finding (see *Kelley*, 419 U.S. at 323), the court reversed the judgment for plaintiff.

The other authority cited by the Utah Court of Appeals in this case is *Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837, 839 & n.4 (7th Cir. 1991). In that case the district court had granted summary judgment on undisputed facts to the railroad on the scope of employment issue. In the course of its affirming opinion at the cited reference, the court followed the request of appellant to look to the Restatement of Agency. However, in rejecting appellant's argument, the court did not even note the guidance of this Court in *Baker* and *Ward* as to the role of a jury.

Because the facts were undisputed, the Seventh Circuit distinguished its prior precedent and approved the trial court's determination of "the legal effect . . . (i.e., was he acting within the scope of his employment?) . . . [as a] question of law on a summary judgment motion." *Id.* at 840. That holding also appears to conflict with *Baker*, 359 U.S. at 229, and *Ward*, 362 U.S. at 400, as to the role of a jury in resolving conflicting conclusions on the basis of all relevant factors.

In any event in this case, unlike the two cited cases, there were disputed factual issues supported by evidence in the trial court and presented below. See portion of petitioner's brief in the Utah Court of Appeals, Appendix G. See also portion of his petition for writ of certiorari in the Utah Supreme Court, quoting *Baker* and referencing the record, Appendix H.

Despite this evidence as to the disputed facts, the Utah Court of Appeals held that "[t]he undisputed facts show that Ruiz was not within the scope of employment in furtherance of interstate commerce at the time of his

accident." Appendix B. That holding translates into one or more of the following:

1) there was no genuine issue as to any material fact;

2) the disputed facts proferred by petitioner were not material;

3) the facts proferred by petitioner do not provide more than a scintilla of evidence or otherwise sufficient evidence to require submission to a jury; and

4) the inferences and conclusions from the facts may be resolved as a matter of law.

In light of these possible explanations and of special interest to this petition is the post-*Baker* case of *Streeter v. Erie R.R. Co.*, 25 F.R.D. 272, 273 (S.D.N.Y. 1960) (citations omitted):

> Whether, at the time of the accident, a plaintiff was acting "while he is employed" by the railroad is generally a question of fact for the jury's determination. The circumstance by and of itself that the injury occurred before or after regularly assigned duty hours, or away from the place of regularly assigned duty, does not necessarily remove from the jury's determination the question of fact whether he was injured "while he is employed."
>
> Even where there is no dispute as to the fact of the event, the determination calls for an inference or a conclusion of fact, and this – like questions of fault or causation – must be left to a

jury unless "reasonable men could not reach differing conclusions."

CONCLUSION

The standards for resolving summary judgment motions in FELA cases require clarification. Petitioner respectfully requests that this Court grant his petition for review of the questions presented in order that the standards may be clarified and his action remanded for trial on its merits. The first question for the jury would be whether he was injured "while he [was] employed" in commerce as defined by Congress in 1939.

Respectfully submitted,

GERALD J. ADLER
Counsel for Petitioner

Dated: Aug. 26, 1996

APPENDIX

APPENDIX A

IN THE SECOND JUDICIAL DISTRICT
COURT OF WEBER COUNTY
STATE OF UTAH

JOSE RUIZ, Plaintiff, vs. SOUTHERN PACIFIC TRANSPORTATION, Defendant.	)	RULING (Filed Jan. 11, 1994) Case No. 910900648

Both parties move for partial summary judgment on the issue of whether plaintiff, a railroad employee, was within the scope of his employment when he was injured. These motions are made in the context of the Federal Employers' Liability Act.

The court grants defendant's motion for partial summary judgment. In doing so, it finds the following facts, viewed most favorably to the plaintiff:

Findings

1. The plaintiff suffered serious injuries on May 18, 1990, as a result of a one-car accident. His injuries left him mentally incompetent, and this court has appointed a guardian and conservator for him.

2. At the time of his accident, he was an employee of defendant, Southern Pacific Transportation Company. He was also a permanent resident of Ogden, Utah, but he temporarily resided at a workcamp in Montello, Nevada, to facilitate his dispatch to worksites directed by the defendant.

3. Montello had been plaintiff's ordinary "on-duty" location since January 1990. As such, defendant paid him from the time he reported to work there each day, and it also provided transportation for him and other employees to various worksites.

4. Prior to the accident, plaintiff sought permission to report to work at a worksite in Lakeside, Utah, instead of at Montello, on Friday, May 18. He made this request because he wanted to go home to Ogden the night before, and the drive back for him was closer to the worksite than to Montello.

5. His foreman, Andrew Gonzales, granted his request, subject to the agreement, discussed on several occasions prior to May 18, that because he would not be in company transportation and under company supervision, he would start and end his work at Lakeside. Accordingly, he would be on his own time and would not be compensated for his travel time to Lakeside, for which he was normally paid overtime, and, further, he would not be reimbursed for operating his private vehicle. He agreed because his proposed arrangement would also allow him to leave directly from Lakeside to Ogden and thus get home three hours sooner for the weekend. Gonzales made this agreement based on his understanding of company policy.

6. Plaintiff subsequently changed his mind about going to Ogden on Thursday night, probably because his crew worked late that day, and he stayed in Montello. His decision to drive his personal vehicle to Lakeside the next morning and to leave directly from Lakeside to Ogden did not change, however. About 5:00 a.m. the morning of the accident, Gonzales knocked on plaintiff's trailer door to inquire if he would be coming with the rest of the work crew who were in the gang truck; he declined. Instead, the plaintiff, who was dressed for work but still fixing his lunch and not assembling for work with the other crew members, said he would drive his own car and join them in Lakeside, where the crew would fix railroad tracks.

7. Enroute from Montello to Lakeside, plaintiff rolled his vehicle on a road owned by the defendant. Defendant paid plaintiff no wage compensation or travel expense for May 18, 1990.

Issues

In opposing defendant's motion, plaintiff presents two issues for determination. First, are Gonzales' declarations concerning plaintiff's statements regarding his personal travel arrangements and his status at the time of the accident objectionable hearsay under Rules 803 and 804, Utah Rules of Evidence? Second, was plaintiff's on-duty location in Lakeside or Montello on May 18, 1993?

Analysis

Based on the facts presented, the court concludes and rules as follows:

Admissions Are Not Hearsay

By his legal position, plaintiff maintains that he was within the scope of his employment at the time of his accident. His statements made to Gonzales prior to and on May 18 controvert that position. Plaintiff seeks to exclude those statements under Rules 803 and 804 on the basis that they are hearsay made inadmissible because plaintiff, who is mentally incompetent, is unavailable as a witness at trial.

Plaintiff's status is more than a witness; he is a party. Consequently, the subject statements, which are his own statements and are offered against him, are party-admissions not hearsay. See Rule 801(d)(2), Utah Rules of Evidence. These statements are, therefore, admissible. Furthermore, Rule 804, which is inapplicable in this case, is an exception to the hearsay rule to allow, not exclude, the admission of hearsay statements against interest if the declarant is "unavailable." It is a rule of necessity, having a predicate of unavailability, to avoid the loss of critical evidence.

Plaintiff Changed His On-Duty Location from Montello to Lakeside

Instead of reporting for duty at Montello with the other employees on the morning of May 18, plaintiff remained in his trailer fixing his lunch. Under his prior agreement with his foreman, Gonzales, he changed his on-duty location to Lakeside for personal reasons and having no causal relationship with his employment. By changing his on-duty location and substituting company

transportation for personal transportation, he, unequivocally, was not under the control and supervision of the defendant when he left Montello for Lakeside. In point, his employer could not supervise his conduct if he chose to exceed the speed limit or to drive without a seat belt, and thus minimize its exposure to liability. Unlike the other crew members who were in the gang truck and under the direction of their foreman and, thus, were ready to perform work as directed, plaintiff was subject to that direction only after he arrived in Lakeside. In short, he was commuting from Montello to Lakeside in his own vehicle.

The mere use of his own vehicle is not controlling in the court's determination. Plainly, the law allows an employee to drive his own vehicle with permission of the employer and still be in the course of his employment. Pivotal in the court's ruling is the agreement between plaintiff and Gonzales to change plaintiff's on-duty location to Lakeside and to be on his own time until he arrived there, thus making the ride from Montello to Lakeside a commute. The other circumstances of not being compensated and reimbursed expenses for the travel between Montello and Lakeside and of using his personal vehicle for the trip only further persuade the court that he was not in the course of his employment but pursuing personal objectives.

While it may be said that plaintiff's driving of his car to Lakeside was done in the furtherance of the mission of defendant's business, because he was needed on the job, and thus that act benefitted [*sic*] the business, it did so no more than any commute by an employee to a business so that he can perform his duties. Likewise, plaintiff's mere

presence in the workcamp in Montello, away from his permanent residence in Ogden, did not establish that he had reported to work; he needed to be available for work and under the supervision and control of the employer.

The court concludes, therefore, that there is no issue as to any material fact and that defendant was not in the course of his employment as a matter of law. Defendant's counsel shall prepare, please, an appropriate order for the court's signature.

Dated this 11 day of January 1994.

/s/ Michael D. Lyon
MICHAEL D. LYON, Judge

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IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY STATE OF UTAH

JOSE RUIZ, Plaintiff, vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, and JOHN DOES I – X, inclusive, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT Civil No. 910900648 Honorable Michael D. Lyon

Defendants' Motion for Summary Judgment and plaintiff's Motion for Partial Summary Judgment came before this Court for hearing on Thursday, December 9, 1993 at 11:15 a.m. The Honorable Michael D. Lyon presided. Plaintiff was represented by Donald Britt and Erik Ward. Defendants were represented by Bryon J. Benevento. Based upon Defendants' Motion for Summary Judgment, Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment, Affidavit of Andrew Stephen Gonzales, Plaintiff's Motion for Partial Summary Judgment, Plaintiff's Memorandum

in Opposition to Defendants' Motion for Summary Judgment, Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, Defendants' Reply to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment; and Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, Plaintiff's Memorandum of Points and Authorities in Reply to Defendants' Motion to Plaintiff's Motion for Summary Judgment, Declaration of Robert Douglas, Defendants' Motion to Strike Affidavit of Robert Douglas, Memorandum of Points and Authorities in Support of Defendants' Motion to Strike Affidavit of Robert Douglas, and oral argument of counsel and for other good cause appearing thereon;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the facts presented by the parties, viewed most favorably to the plaintiff, demonstrate that as a matter of law plaintiff was not within the scope of his employment at the time he was injured. Therefore, Defendants' Motion for Summary Judgment is granted, and Plaintiff's Motion for Partial Summary Judgment is denied. The case is hereby dismissed.

DATED this 27 day of Jan, 1994.

BY THE COURT

/s/ Michael D. Lyon
Michael D. Lyon
Second Judicial District
Court Judge

APPENDIX B

IN THE UTAH COURT OF APPEALS

Jose Ruiz, Plaintiff and Appellant, v. Southern Pacific Transportation Company; and Does 1 through 10, inclusive, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 940661-CA (FILED February 1, 1996)

Second District, Weber County
The Honorable Michael D. Lyon

Attorneys: Erik M. Ward, Ogden, Donald S. Britt and Gerald J. Adler, Sacramento, California, for Appellant E. Scott Savage, Casey K. McGarvey, and Byron J. Benevento, Salt Lake City, for Appellees

---

Before Judges Orme, Bench, and Jackson.

BENCH, Judge:

Ruiz Asserts that the trial court erred by granting summary judgment to Southern Pacific. Ruiz claims that there is a genuine issue of material fact concerning whether he was pursuing a duty in "furtherance of interstate . . . commerce" when his vehicle rolled over on a

Southern Pacific road. *See* 45 U.S.C.A. § 51 (1986). We affirm.

Ruiz was not in furtherance of interstate commerce when his accident occurred. Ruiz does not dispute that he had made previous arrangements with his supervisor to drive his own vehicle to the work site for "personal reasons." Because Ruiz was pursuing his own interests by driving his own vehicle to Lakeside, and not the interests of Southern Pacific, he was not pursuing a duty "in furtherance of interstate commerce." *See Atchison, Topeka & Santa Fe Ry. Co. v. Wottle*, 193 F.2d 628, 631 (10th Cir.), *cert. granted, Wottle v. Atchison, Tobeka [sic] and Santa Fe Ry. Co.*, 343 U.S. 963, 72 S. Ct. 1063, *cert. dismissed, Wottle v. Atchison, Tobeka [sic] and Santa Fe Ry. Co.*, 344 U.S. 850, 73 S. Ct. 89 (1952). The fact that he was driving on a Southern Pacific road does not compel a different result.

Ruiz argues that, according to the Collective Bargaining Agreement, he should have been paid during his travel. Rule 30 of the Collective Bargaining Agreement provides, however, that "[e]mployes shall not be allowed time while traveling . . . between their homes and designated assembling points, or for other personal reasons." Thus, because Ruiz was traveling in his own vehicle for personal reasons, he was not entitled to pay.

Ruiz also asserts that his assembling point was at Montello rather than Lakeside. Based on Ruiz's [*sic*] agreement with his supervisor, Ruiz agreed to assemble at Lakeside despite the fact that the rest of his work gang assembled at Montello.

The undisputed facts show that Ruiz was not within the scope of employment in furtherance of interstate commerce at the time of his accident. *See Rogers v. Chicago & North Western Transp. Co.*, 947 F.2d 837, 839 & n.4 (7th Cir. 1991). We therefore affirm the summary judgment entered in favor of Southern Pacific.

/s/ Russell W. Bench
Russell W. Bench, Judge

WE CONCUR:

/s/ Gregory K. Orme
Gregory K. Orme,
presiding Judge

/s/ Norman H. Jackson
Norman H. Jackson, Judge

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF UTAH

Jose Ruiz,

Plaintiff and Petitioner,

v.

Southern Pacific Transportation Company,

Defendant and Respondent.

No. 960115
940661-CA
910900648

The Petition for Writ of Certiorari is denied.

5/29/96
Date

/s/ M. Zimmerman
Michael D. Zimmerman
Chief Justice

For The Court

APPENDIX D

§ 51. Liability of Common Carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employees shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases"

(approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

(Apr. 22, 1908, ch 149, § 1, 35 Stat. 65; Aug. 11, 1939, ch 685, § 1, 53 Stat. 1404 [adding second paragraph].)

APPENDIX E

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IN THE SECOND JUDICIAL DISTRICT COURT
OF WEBER COUNTY

FOR THE STATE OF UTAH

JOSE RUIZ, Plaintiff, v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, and JOHN DOES I-X, inclusive, Defendants.	**MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** Civil No. 910900648 Honorable Michael D. Lyon Hearing Date: 12/9/93

* * *

Since the facts indicate plaintiff had already reported to work before his automobile accident, he was within the scope of employment at the time of his injury. *Atchison, T. & S.F. R. Co. v. Wottle* (10th Cir. 1952) 193 F.2d 628, 630. (See copies of pertinent case law, Exhibit "B".) In *Atchison*, the court held once a railroad employee reports

for duty, any subsequent injury he suffers is within the scope of employment. The court said:

> It is no longer doubted that the [FELA] extends to and covers not only the actual work performed . . . but those acts which can be said to be necessarily incident thereto. Thus an employee is working [within the scope of employment] ***while going to and from his actual place of work after reporting for duty.*** *Id.* [Citations omitted, emphasis added.]

Thus, even if the courts [*sic*] admits the hearsay portions of the Gonzales declaration, plaintiff has provided sufficient facts showing plaintiff was within the scope of employment at the time of his injury.

3. Fact ten is also disputed because defendant admits they permitted plaintiff to use his own car to drive to the Utah worksite. In his deposition, Mr. Gonzales said he gave plaintiff permission to use his own car.

> Q. . . . When you saw him, you saw him at his trailer at Montello Friday morning about five a.m. correct?
>
> A. Yes.
>
> Q. Leyba was in the truck along with Corral?
>
> A. Yes.
>
> Q. You got out of the truck and knocked on his trailer door, correct?
>
> A. Yes.
>
> Q. And asked if he wanted to go in the truck with you, correct?
>
> A. Yes.

Q. And he said no, I'll drive my car so I can leave from Lakeside, correct?

A. Yes.

Q. And you said "Fine" I'll meet you there, correct?

A. Yes. (Exhibit "A" at 69:20 to 70:13)

This admission compels a finding plaintiff was within the scope of employment at the time of his injury. Whether plaintiff was compensated for that trip is not relevant.[1]

In *Temple v. Southern Pacific Trans. Co.* (Cal. 1980) 105 Cal.App.3d 988 (See Exhibit "B"), a brakeman was injured in an automobile collision while returning to his train after a layover. *The brakeman had been driving his own car at the time of the injury.* The brakeman brought a FELA action. The railroad moved for summary judgment asserting the injury did not occur while plaintiff was in the scope of employment. The court reversed summary judgment for the railroad, stating:

> [I]f the activity in which the [employee] was engaged at the time of the tort complained of was within the course and scope of employment, *the fact that the automobile was used by him and which caused the injury, belonged to the [employee], will not preclude the person injured in recovering from the employer, if the [employee's] use of the vehicle was, either expressly or impliedly, authorized by the employer. Id.* at 993.

---

[1] The collective bargaining agreement between plaintiff's union and defendant should have compelled defendant to pay the cost of plaintiff's drive to the worksite.

Thus, the express grant of permission to plaintiff to use his own car to drive to the Utah worksite precludes summary judgement and actually militates in favor of finding plaintiff was within the scope of employment when he was injured.

ARGUMENT

II.

DEFENDANT IS LIABLE FOR INJURIES THAT OCCUR INCIDENT TO THE ACTUAL WORK

This is an action for personal injuries by a railroad worker pursuant to the Federal Employer's Liability Act (FELA) 45 USC §51 et seq. On or about May 14, 1990, plaintiff JOSE RUIZ was injured in a solo rollover type automobile accident while driving his car on a private road owned and maintained by defendant SOUTHERN PACIFIC. This road paralleled the railroad tracks.

At the time of injury plaintiff was an employee of SOUTHERN PACIFIC and was driving on the railroad's private road towards his Utah worksite *after* reporting to work at his employer's Nevada workcamp. Defendant moves for summary judgment asserting plaintiff was not in the scope of employment at the time of the injury because he was driving his own car (rather than riding in the company truck) towards the worksite and was therefore "commuting to his workplace" and not in the scope of employment at the time of injury.

This contention is wrong. The FELA establishes SOUTHERN PACIFIC is liable in tort for any worker injury suffered in the scope of employment. Scope of

employment has been interpreted to encompass acts "incidental to the employment as well as the actual work." *Fowler v. Seaboard Coastline R. Co.* (5th Cir. 1981) 638 F.2d 17, 20. Thus, an employee is considered within the scope of his employment though he was not engaged in his actual work at the time of the injury. See, *Erie Railroad Co. v. Winfield* (1917) 37 S.Ct. 556 [employee injured while leaving rail yard after work held within scope of employment]; *Morris v. Penn. RR Co.* (1st Cir. 1951) 187 F.2d 837 [employee killed at place of employment shortly before he was to report to work held within scope of employment]; *Texas & Pacific RR v. Jones* (5th Cir. 1962) 298 F.2d 188 [injured worker not performing usual task, but helping fellow worker, held within scope of employment.]

In *Leek v. B & OR. Co.* (MD W.Va 1962) 200 F.Supp. 368, 371 the employee was injured while riding in a taxi cab from the worksite to the railroad yard. The court found the taxi cab company acted on behalf of the railroad which brought the injury within the scope of the FELA.

Defendant claims plaintiff was commuting to work at the time of his injury. To support this claim, defendant offers the declaration of Mr. Gonzales who asserts plaintiff asked for and received permission to drive his own car from the Nevada workcamp where the maintenance crew had assembled to the worksite location in Utah. Apparently, defendant believes plaintiff's receipt of permission to drive his own car to the worksite somehow changed his status on the day of injury from one who had already reported to work and was on his way to the worksite to one who was merely commuting to work.

However, defendant admits plaintiff's home was in Ogden, Utah, hundreds of miles from the Nevada workcamp, and that plaintiff could drive home for the weekend after work rather than go back to the workcamp in Nevada to return his car. Defendant also admits plaintiff appeared at the workcamp, ready for duty. Only after plaintiff apparently talked to Mr. Gonzales did he leave for the worksite in Utah. These facts clearly indicate plaintiff had "reported for duty" before his accident. Therefore, the court can reach but one conclusion; plaintiff JOSE RUIZ was in the scope of employment at the time of his injury on May 14, 1990. *Atchison, T. & SF RR. Co. v. Wottle* supra, 193 F.2d 628, 630.

APPENDIX F

IN THE UTAH COURT OF APPEALS

JOSE RUIZ, Plaintiff/Appellant v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant/Appellee	Appellate Court No. 940661-CA Priority Classification 15

BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

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* * *

VI. SUMMARY OF ARGUMENTS

1. *Applicability and scope of federal law to plaintiff's employment status.*

A. The rights and obligations of the parties in a Federal Employers' Liability Act case are controlled by federal law.

B. The term "employed" as used in the Federal Employers' Liability Act of 1908 was intended to describe the conventional relationship of employer and employee.

C. By amendment in 1939 Congress expanded the benefits of the Federal Employers' Liability Act so as to avoid narrow distinctions and to comprehensively expand coverage.

2. *Plaintiff's employment status prior to the accident*

A. Plaintiff Jose Ruiz was covered by the Federal Employers' Liability Act before leaving his trailer headquarter [*sic*] on the day of the accident.

B. Because plaintiff's trip from his headquarters to the work site was a necessary incident of his employment, he was covered by the act during the entirety of his trip prior to the accident.

C. Because plaintiff was on defendant's private road leading to the actual work site, he was covered by the act during at least that portion of his trip.

3. *The trial court's errors.*

A. Plaintiff's mode of travel did not remove him from the act's coverage.

B. Neither the willingness of plaintiff to forego pay nor the understanding of his supervisor in that regard removed plaintiff from the act's coverage and benefits.

C. The trial court erred in not ruling as a matter of law, against defendant's motion for summary judgment.

D. At the very least, the trial court erred in not ruling that there were material triable issues of fact.

* * *

APPENDIX G

IN THE UTAH COURT OF APPEALS

JOSE RUIZ, Plaintiff/Appellant v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant/Appellee	Appellate Court No. 940661-CA Priority Classification 15

BRIEF OF APPELLANT

AN APPEAL FROM THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

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* * *

C. The court failed to recognize triable factual issues.

Although it is the view of plaintiff that, as a matter of law he was "employed" at the time of his injury, it must be pointed out that even under the trial court's view of material facts, there were material factual issues in dispute. Those issues concern plaintiff's "on-duty" point, the validity of any agreement to change that point and plaintiff's entitlement to pay.

In its findings and ruling, the court determined that plaintiff's request to drive his own vehicle to the work site constituted a request to report to work at Lakeside, Utah and, therefore, change his "on-duty" location from its usual location at Montello, Nevada. That purported change in "on-duty" location, by the court's analysis, converted the trip to the work site into a "commute" during which plaintiff was "not in the course of his employment."

In making these finding [*sic*] and ruling, the court ignored the following evidence:

(1) Under the collective bargaining agreement, employees' time starts at regular designated assembly points. (R. at 352, 418).

(2) When an employee's living quarter is a trailer furnished by the railroad, the trailer is established as the employee's headquarters and designated assembly point. (R. at 353, 418).

(3) Plaintiff's foreman did not have authority to alter plaintiff's starting time. (R. at 418).

(4) Plaintiff "assembled" at his headquarter [*sic*] point at Montello, Nevada. (R. at 418-19).

The court also found persuasive the fact that plaintiff was not compensated by defendant for his travel time after leaving the work camp enroute to the work site. However, the preceding evidence, also established that plaintiff was entitled to be compensated for that time. In addition, there was other competent evidence, relating to the pay issue, which was presented by the general chairman of plaintiff's union, that under the collective bargaining agreement, plaintiff was entitled to be compensated starting at Montello on the day of his accident. (R. at 417-19).

Thus, even if the FELA were ignored, as the trial court did, and everything turned on plaintiff's "agreement" and on the issue of pay, the trial court ignored evidence relating to the validity and effect of the "agreement" as it related to both the designated assembly point and plaintiff's entitlement to pay for his time going to the work site.

On this analysis alone the court erred in concluding as a matter of law that plaintiff was not in the scope of his employment.

* * *

APPENDIX H

IN THE UTAH SUPREME COURT

JOSE RUIZ, Plaintiff/Petitioner vs. SOUTHERN PACIFIC TRANSPORTATION COMPANY, Defendant/Respondent	**PETITION FOR WRIT OF CERTIORARI** Case Number; 940661-CA Priority Classification 15

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE COURT OF APPEALS

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THE SECOND DISTRICT COURT
WEBER COUNTY

Judge Michael D. Lyon

* * *

The federal FELA rule is similar:

> The Federal Employers' Liability Act does not use the terms "employee" and "employed" in an special sense. . . . It has been well said of the question that "[e]ach case must be decided on its peculiar facts and ordinarily no one feature of the relationship is determinative." . . . [T]he question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. . . . Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury. *Baker v. Texas & Pac. Ry. Co., supra* at 228.

Although it is the view of plaintiff that, as a matter of law he was "employed" at the time of his injury, it must be pointed out that even under the trial court's view of material facts, there were material factual issues in dispute. Those issues concern plaintiff's "on-duty" point, the validity of any agreement to change that point and plaintiff's entitlement to pay.

In its findings and ruling, the court determined that plaintiff's request to drive his own vehicle to the work site constituted a request to report to work at Lakeside, Utah and, therefore, to change his "on-duty" location

from its usual location at Montello, Nevada. See Appendix B. That purported change in "on-duty" location, by the court's analysis, converted the trip to the work site into a "commute" during which plaintiff was "not in the course of his employment."

In making these findings and ruling, the court ignored the following evidence:

(1) Under the collective bargaining agreement, employees' time starts at regular designated assembly points. (R. at 352, 418).

(2) When an employee's living quarter is a trailer furnished by the railroad, the trailer is established as the employee's headquarters and designated assembly point. (R. at 353, 418).

(3) Plaintiff's foreman did not have authority to alter plaintiff's starting time. (R. at 418).

(4) Plaintiff "assembled" at his headquarters point at Montello, Nevada. (R. at 418-19).

The court also found persuasive the fact that plaintiff was not compensated by defendant for his travel time after leaving the work camp enroute to the work site. However, the preceding evidence also established that plaintiff was entitled to be compensated for that time. In addition, there was other competent evidence relating to the pay issue which was presented by the general chairman of plaintiff's union, that under the collective bargaining agreement, plaintiff was entitled to be compensated starting at Montello on the date of his accident. (R. at 417-19)

Thus, even if the FELA were ignored, as the trial court did, and everything turned on plaintiff's "agreement" and on the issue of pay, the trial court ignored evidence relating to the validity and effect of the "agreement" as it related to both the designated assembly point and plaintiff's entitlement to pay for his time going to the work site.

On this analysis alone, the court erred in concluding as a matter of law that plaintiff was not in the scope of his employment.

This error, in contravention of the teachings of this court and the United States Supreme Court, is a further basis in support of this petition for review.

* * *

Supreme Court, U.S.
FILED
OCT 3 1996
CLERK

(2)

No. 96-325

In The
Supreme Court of the United States
October Term, 1996

JOSE RUIZ

Petitioner,

vs.

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Respondent.

On Petition For Writ of Certiorari
To The Utah Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

1. Is there a compelling reason for this Court to grant Jose Ruiz's petition for writ of certiorari in order to review an affirmed order of summary judgment in favor of Southern Pacific Transportation Company that was entered on the grounds that, as a matter of law upon the undisputed facts of record, Mr. Ruiz was acting outside the scope of his employment at the time he was injured because he was pursuing his own interests and was not under the control or supervision of Southern Pacific Transportation Company?

2. Should this Court grant certiorari to review the two questions presented by Mr. Ruiz, regarding "the quantity and quality of evidence" to defeat a motion for summary judgment granted on the basis that upon undisputed facts the plaintiff was acting outside the scope of his employment, when these issues are raised for the first time in Mr. Ruiz's Petition for Writ of Certiorari and were not considered below because they were not raised below?

LIST OF PARTIES

There are no additional parties to this proceeding who do not appear in the caption of this case. However, Southern Pacific Transportation Company is a wholly owned subsidiary of Southern Pacific Rail Corporation. Southern Pacific Rail Corporation is now owned by Union Pacific Corporation. Some shares of Union Pacific Corporation are publically traded. Southern Pacific Transportation Company owns the stock of: 1) The Denver & Rio Grande Western Railroad Company which owns a portion of the capital stock of: a) Denver Union Terminal Railway Company; and b) TTX Company; and 2) SPCSL Corp. which owns a portion of the capital stock of Southern Pacific Mexico, S.A.deC.V. Southern Pacific Transportation Company also owns a portion of the capital stock of: 1) Southern Pacific Mexico, S.A.deC.V.; 2) Central California Traction Company; 2) The Ogden Union Railway & Depot Company; 3) Portland Terminal Railroad Company; 4) Portland Traction Company; 5) Sunset Railway Company; 6) TTX Company; and 7) St. Louis Southwestern Railway Company which also owns a portion of the capital stock of: a) The Alton & Southern Railway Company; b) Arkansas & Memphis Railway Bridge and Terminal Company; c) Kansas City Terminal Railway Company; d) Southern Illinois and Missouri Bridge Company; e) Terminal Railroad Association of St. Louis; and f) TTX Company.

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Utah Rules of Civil Procedure 56 8

OPINIONS BELOW

The rulings, orders and opinions of the trial court and appellate courts of Utah, which Jose Ruiz ("Ruiz" or "Petitioner") seeks to have this court review, have not been published in any official or unofficial reporter. However, complete copies have been included in Appendix A through Appendix C of Ruiz's Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Southern Pacific Transportation Company ("Southern Pacific" or "Respondent") agrees that 28 U.S.C. § 1257(a) confers jurisdiction on this Court to consider Ruiz's Petition for Writ of Certiorari.

FEDERAL STATUTE INVOLVED

Ruiz's state court action was based solely on the Federal Employers' Liability Act, 45 U.S.C. § 51 ("FELA"), which reads, in pertinent part, as follows:

> Every common carrier by railroad while engaged in commerce between any of the several States . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier* in such commerce . . . resulting in whole or in part from the negligence of . . . such carrier . . . . (Emphasis added.)

Ruiz also cites to the second paragraph of this statute. However, that paragraph is not relevant to the issues before this Court, nor was it

relevant below. The second paragraph only clarifies that an employee's duties for his/her employer furthers interstate commerce, for purposes of this statute, when the duties of employment in "any way directly or closely and substantially, affect such commerce." The facts on which summary judgment was granted in Southern Pacific's favor was not that Ruiz was not performing duties that furthered interstate commerce, but more fundamentally that Ruiz was not performing any employment duties for Southern Pacific at the time he was injured. On these facts, the Utah state courts below all agreed that Ruiz was not acting within the scope of his employment, as a matter of law, and none of those courts ever had to consider the next issue of whether Ruiz's conduct also somehow furthered interstate commerce within the meaning of the second paragraph of 45 U.S.C. § 51. This Court, therefore, should not be confused by Ruiz's references to such irrelevant portions of Section 51.

STATEMENT OF THE CASE

Ruiz has initiated two state court actions against Southern Pacific alleging the right to recover for the same injuries from the same incident. The action now before this Court on Ruiz's petition was brought solely under the FELA, alleging Southern Pacific was negligent as a FELA employer. Ruiz's other action also alleges Southern Pacific was negligent, but for common law reasons other than Southern Pacific's conduct as an employer. That other action still is pending and is not affected by the dismissal of this action for which certiorari is sought.

Specifically, Ruiz claims that on May 18, 1990, while he was driving to a work site, alone in his own automobile, he was injured in

a one-car rollover accident. Because the basis of the instant claim is the FELA, an essential element Ruiz has to prove before he can recover under this statute is that at the time of his roll-over accident he was acting within the course or scope of his employment.

After discovery, Southern Pacific filed a motion for summary judgment asserting that upon the undisputed material facts of record Ruiz could not establish the essential element of his claim in this case that he was acting within the scope of his employment when he was injured. Therefore, as a matter of law, he could not prevail in this action. On the same facts, Ruiz also filed a motion for partial summary judgment to be entered in his favor on this same issue. The relevant facts relied on by both parties were, and are, undisputed.

The Second District Court for Weber County, State of Utah, denied Ruiz's motion and granted Southern Pacific's motion for summary judgment. On appeal, the Utah Court of Appeals affirmed. The Utah Supreme Court denied Ruiz's petition for writ of certiorari. The specific, undisputed facts relevant to the decisions of the courts below are:

1. In May 1990, Ruiz was an employee of Southern Pacific assigned to work on Southern Pacific's tracks and right-of-way at Lakeside, Utah, which required him, and the other members of his work gang, to live at Southern Pacific's work camp at Montello, Nevada. Montello is approximately 75 miles from Lakeside. (R. 174-75, 254.)

2. The entire work gang customarily assembled at Montello at 5:00 a.m. and traveled together to the work site at Lakeside

by company truck, which would take approximately two hours, during which time they were under Southern Pacific's control and direction, and were paid for their time. (R. 175-76, 259-60, 304.)

3. However, prior to the date of the accident, Ruiz voluntarily requested permission not to travel to Lakeside with the other gang members in the company truck because, for his own convenience, he wanted to drive his own vehicle to Lakeside so that, at the end of the workday, he could leave directly from Lakeside for his home in Ogden, Utah, rather than returning that evening to Montello with his work gang. (R. 175, 305-14, 498-99.)

4. Ruiz's request was granted by his supervisor with the understanding that since Ruiz would not be under Southern Pacific's supervision, Ruiz would not be paid for his time nor reimbursed for his use of his own vehicle. (Id.)

5. On the day of the accident, May 18, 1990, Ruiz did not gather with the rest of the work gang in the company truck, or submit himself to the supervision or control of Southern Pacific, but he left after the gang left, and drove his own car for his own convenience to the work site at Lakeside. (R. 175, 311-15.)

6. On the day of the accident, Ruiz's on duty point, for the purpose of receiving compensation, was agreed to be Lakeside. (R. 314, 414.)

7. Ruiz was not paid for the time he spent commuting in

his car that day, nor was he reimbursed for his own use of his vehicle. (R. 176.)

8. Ruiz was injured in a rollover accident 14 miles away from Lakeside, before he had reported for duty at Lakeside. (R. 166-68, 287, 395.)

The Utah courts below granted, and affirmed, summary judgment for Southern Pacific because upon these undisputed facts of record, at the time of the accident, Ruiz was pursuing his own personal objective of driving his own car to the work site so that he could conveniently get home earlier after work. Ruiz did not have to drive his own car and his doing so did not benefit Southern Pacific. Moreover, Southern Pacific had no control over or ability to supervise Ruiz while he was driving his own car. The courts below found that all other courts that have considered the scope of employment issue have concluded, under circumstances involving the employee's exercise of his own choice and the employer's lack of control or supervision, that such employees were acting outside the scope of their employment when injured. The Utah courts merely followed this precedent in also holding that Ruiz was acting outside the scope of his employment when he rolled his car.

REASONS FOR DENYING THE WRIT

I.
THE DECISIONS BY THE UTAH COURTS BELOW DO NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY OTHER COURT.

Ruiz has argued before this Court that there is a major conflict in decisions coming out of various circuit courts, and that the decision of the Utah Court of Appeals adds to this conflict. He does so because Rule 10 of this Court states that conflicting decisions is the type of reason this Court considers in granting certiorari. Indeed, this Court's rule provides that "a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Nevertheless, there is no relevant conflict in the decisions of the Utah Court of Appeals and any other court. Therefore, there is no compelling reason for this Court to grant Ruiz's petition.

The decisions below, granting and affirming Southern Pacific's motion for summary judgment, do not conflict with the decisions of this Court or any other court. To the contrary, the decisions of both the trial court and the Utah Court of Appeals are soundly reasoned, and conform to applicable federal FELA case law. It is significant that Ruiz does not make the claim before this Court that any other court has entered a ruling or opinion, on the same or similar set of facts, that holds an FELA employee, or any employee, was acting within the scope of his employment. Indeed, all applicable FELA case law holds that an employee is outside the scope of his/her employment when pursuing

his/her own objectives beyond the control and supervision of his/her employer when injured. Ruiz does not even attempt, before this Court, to claim otherwise.

Ruiz did argue to the Utah Supreme Court that it should exercise its discretion to again review this case *de novo*, after the Utah Court of Appeals had affirmed the summary judgment ruling, because there were conflicting decisions from that court as well as this Court. Ruiz has discarded that argument in the instant petition to this Court. He did so for good reasons. There are no decisions from Utah, any other state court, any federal district or circuit court or this Court that conflict with the holdings of the Utah trial court and court of appeals entered in this case.[1] There simply is no conflicting case authority for the substantive legal holding that upon the uncontested facts of record Ruiz was acting outside the scope of his employment when he rolled his car because he was pursuing personal objectives outside the control and supervision of his employer.

Before this Court, Ruiz now takes the novel approach, never before taken in this case, that the quantity and quality of the evidence somehow resulted in a judgment that is in conflict with other circuit court opinions. It is impossible to understand the applicability of Ruiz's argument because he never explains how it is relevant in the context of this case.

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[1] The Argument section of Southern Pacific's "Brief of Respondent in Opposition to Petition for Writ of Certiorari to Review the Decision of the Court of Appeals," that was filed in the Utah Supreme Court, is reprinted as Appendix A hereto for the benefit of the Court.

Ruiz argues that other court decisions pertaining to the evidentiary requirements imposed upon FELA plaintiffs to withstand a motion for summary judgment, on the issue of scope of employment as well as other issues that are inapplicable to this case, are in conflict, citing to various circuit court opinions. However, neither the trial court nor Utah Court of Appeals ever considered the specific issue that some other evidentiary requirement is imposed on Ruiz in this case. Those courts below merely applied, without objection, the traditional standard imposed by Rule 56, Utah Rules of Civil Procedure, that is similar to the Federal Rules of Civil Procedure, which requires summary judgment to be entered if the evidence of record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ruiz never raised the issue below that a different standard existed as to the specific issue involved in this case so that either the trial court or appellate court could consider his argument. Thus, Ruiz's argument before this Court that the Utah Court of Appeals has rendered an opinion regarding evidentiary standards that conflict with other cases makes no sense in the context of this case. Moreover, there are additional reasons why this Court should not review this new issue raised by Ruiz.

Generally, this Court will not consider any issue that was not raised in the courts below. *E.g., Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) ("[Q]uestion was not raised in the Court of Appeals and is not properly before us"); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). *See also, Ramsey v. United Mine Workers,* 401 U.S. 302, 311-12 (1971)(finding consideration of an issue not presented below

inappropriate for lack of support in the record). Thus, this Court should not grant a writ of certiorari to consider Ruiz's new issue, that the Utah courts below did not have a chance to consider, on which there is no record.

In addition, the case authority cited by Ruiz does not establish that any conflict exists between any two courts on the issue of whether summary judgment is appropriate, and indeed required, when on undisputed facts of record there is no reasonable basis to conclude that a FELA plaintiff is acting within the scope of his/her employment. The cases cited by Ruiz are in accord that summary judgment as a matter of law is warranted simply when there are no facts of record to support all the necessary elements of a FELA cause of action.

For example, in *Brady v. Southern Ry.*, 320 U.S. 476, 479-80 (1943), this Court applied the traditional judgment as a matter of law analysis to the issue of whether the railroad was negligent in failing to furnish a reasonably safe place to work, and finding for the railroad the Court stated that "[w]hen the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict." *See also Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 228-29 (1959)(applying traditional judgment as a matter of law analysis and finding on the facts that reasonable men could differ on whether the plaintiff was even an employee; therefore that issue should have gone to the jury); *North Carolina R.R. v. Zachary*, 232 U.S. 248, 258-61 (1914)(applying traditional judgment as a matter of law analysis and finding an essential fact in doubt requiring a remand of the case for a jury trial on the issue of whether an employment

relationship existed); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1362 (9th Cir. 1995)(finding no material factual disputes on the issue of respondeat superior in a FELA action and granting summary judgment on that issue for the railroad); *Brown v. CSX Transp. Inc.*, 18 F.3d 245, 248-50 (4th Cir. 1994)(applying traditional directed verdict analysis and finding no legally sufficient evidentiary basis for a reasonable jury to find for the FELA plaintiff and directing verdict for the railroad); *Harbin v Burlington Northern R.R.*, 921 F.2d 129, 130-32 (7th Cir. 1990)(applying traditional summary judgment analysis and holding that genuine issue of material fact precluded grant of summary judgment in favor of railroad on negligence issue); *Wilson v. Chicago, M., St. P. & Pac. R.R.*, 841 F. 2d 1347, 1352-58 (7th Cir. 1988)(applying traditional summary judgment analysis and holding that genuine issue of material fact precluded grant of summary judgment in favor of railroad on scope of employment issue); *Gill v. Pennsylvania R.R.*, 201 F.2d 718, 721-22 (3rd Cir. 1953)(applying traditional directed verdict analysis and finding no evidentiary support for jury verdict for FELA plaintiff and entering judgment for railroad); *Turpin v. Chicago, Burlington & Quincy R.R.*, 403 S.W.2d 233 (Mo. 1966)(applying traditional directed verdict analysis and finding no employment relationship as a matter of law); *Vinyard v. Missouri Pac. R.R.*, 632 S.W.2d 272 (Mo. Ct. App. 1982)(applying traditional directed verdict analysis and finding issues in dispute so that jury should resolve the issue of whether employment relationship existed).

Other cases, more on point but not cited by Ruiz, agree that the traditional summary judgment analysis, as applied by the Utah courts below, is the proper "evidentiary standard" for the issue of whether an employee is outside the scope of employment. *See, e.g., Rogers v.*

Chicago & Northwestern Transp., 947 F.2d 837 (7th Cir. 1991)(finding no factual dispute and holding as a matter of law plaintiff not within scope of employment; summary judgment granted); *Fowler v. Seaboard Coastline R.R.*, 638 F.2d 17 (5th Cir. 1981)(finding no factual dispute and holding as a matter of law plaintiff not within scope of employment; summary judgment granted); *Thompson v. National R.R. Passenger Corp.*, 774 F. Supp. 1087, 1088 (N.D. Ill. 1991), *aff'd*, 966 F.2d 1457 (7th Cir. 1992)(finding no factual dispute and holding as a matter of law plaintiff not within scope of employment; summary judgment granted); *Williams v. Norfolk Southern Ry.*, 767 F. Supp. 756 (E.D.Va. 1991)(applying traditional summary judgment analysis and holding as a matter of law plaintiff not within scope of employment; summary judgment granted). *Cf. Getty v. Boston & Maine Corp.*, 505 F.2d 1226 (1st Cir. 1974)(applying traditional directed verdict analysis and finding plaintiff outside scope of employment as a matter of law); *Quirk v. New York, C. & St. L. R.R.*, 189 F.2d 97 (7th Cir. 1951), *cert. denied*, 352 U.S. 871 (1951)(applying traditional directed verdict analysis and finding plaintiff outside scope of employment as a matter of law).

The remaining cases cited by Ruiz are all irrelevant. They have nothing to do with the issues involved in this case. For example, Ruiz cites to a Sixth Circuit decision, *Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803 (6th Cir. 1996), to demonstrate a conflict. The *Aparicio* court considered, and resolved for the Sixth Circuit, questions regarding the quantum of evidence standard necessary to overcome a directed verdict on the issue of *employer negligence* in a FELA action. *Aparicio*, 84 F.3d at 806-15. The court noted a line of cases requiring a FELA plaintiff to show a "scintilla of evidence tending to show negligence" to overcome a motion for a directed verdict on the *employer negligence* issue. *Id.* at808-09. The court also noted a line of

cases requiring a FELA plaintiff to show something more than a "scintilla" to overcome a motion for a directed verdict on the *employer negligence* issue. *Id.* at 809-10.[2] To resolve this"conflict," the Sixth Circuit ultimately adopted a requirementthat a FELA plaintiff must show "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Id.* at 810.

The *Aparicio* court clearly did not consider the question at issue in the case at bar of whether the alleged injury occurred while the employee was acting within the scope of his/her employment. Thus, any "conflict" as to the question of evidence necessary to prove employer negligence does not affect the Utah courts' rulings that as a matter of law, on the undisputed facts of record, Ruiz was not acting within the scope of his employment when he was injured. The profound difference in these two legal issues is obvious.

Moreover, the employer negligence issue was not the only issue considered by the *Aparicio* court. The *Aparicio* court, in the same decision, upheld the lower court's granting of the railroad's summary judgment motion on the basis that the plaintiff's action was not filed within three years as required by statute. 45 U.S.C. § 56. Applying traditional summary judgment analysis, that lower court found no material factual dispute, much like the Utah trial court on the issue of

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2 The Aparicio court admitted that this "conflict" it presented may not be a real conflict at all, stating that its disagreement with apparently contrary authority "may be based upon a distinction without a difference. 'More than a scintilla' means precious little more than a scintilla given the Supreme Court's view that Congress has favored Federal Employers' Liability Act plaintiffs with a jury resolution of all colorable factual issues." 84 F.3d at 810 (citing *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957)).

scope of employment. To this extent, *Aparicio* is in accord that summary judgment is warranted simply when there are no facts of record to support all the necessary elements of a FELA action.[3]

Also, Ruiz has failed to establish a conflict between *Aparicio*, the Seventh Circuit in *Wilson v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 841 F.2d 1347 (7th Cir. 1988), and the Missouri state courts in *Turpin v. Chicago, Burlington & Quincy Railroad Co.*, 403 S.W.2d 233 (Mo. 1966) and *Vinyard v. Missouri Pacific Railroad Co.*, 632 S.W.2d 272 (Mo. Ct. App. 1982) which he claims exists.

The *Wilson* court, unlike the Sixth Circuit in *Aparicio*, considered the FELA scope of employment issue in the context of summary judgment. *Wilson*, 841 F.2d 1352-58. Quoting Rule 56 of the Federal Rules of Civil Procedure and citing to this Court's opinion in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Wilson court explained that "a party opposing a summary judgment motion must 'set forth specific facts showing that there is a genuine issue for trial.'" *Wilson*, 841 F.2d at 1352. The court further stated:

> 'Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury.' That is precisely the familiar sum-

[3]This includes the element of "employer negligence." Ruiz cites to no case authority which holds that for purposes of summary judgement a different evidentiary standard applies to this element other than the traditional summary judgement standard. The *Aparicio* court was considering the amount of evidence neccesary to allow the issue of employer negligence to go to the jury in the context of a motion for *directed verdict*. Neither *Aparicio*, nor *Rogers v. Missouri Pacific Railroad Co.*, relied upon by the *Aparicio* court, stand for the proposition that in the context of a motion for summary judgement brought by the employer the motion should be denied even when there are no facts of record to reasonably support the conclusion that the employer was negligent.

> mary judgment standard. While having a jury is 'part and parcel of the remedy afforded railroad workers' under FELA, there must be a genuine issue of material fact for the jury to determine.

Id. at 1354 (quoting *Baker v. Texas & Pac. Ry.*, 359 U.S. 227, 228 (1959)(other citations omitted).

The plaintiff in *Wilson* argued that the quality of evidence must be less than that traditional summary judgment standard, based on this Court's opinion in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). The circuit court disagreed and adhered to the traditional summary judgment standard and analysis on the scope of employment issue. The court then explained that to effectuate FELA's pure comparative negligence provisions, the Court in *Rogers* held that the defendant's ***negligence*** must go to the jury on even the slightest proof of ***employer negligence***. However, when the issue is whether the plaintiff was in the scope of employment, as opposed to employer negligence, Rule 56 governs as traditionally applied. *Wilson*, 841 F.2d at 1353.

The Sixth Circuit in *Aparicio* never considered the scope of employment issue on summary judgment, as did the Seventh Circuit in *Wilson*. Because the cases focused on different issues, they cannot, by definition, conflict. Moreover, the *Wilson* court upheld the application of a traditional summary judgment analysis to the scope of employment element of a FELA cause of action; thus, it is in complete harmony with the analysis applied by the Utah courts below. No case has been cited that conflicts with the holding of the *Wilson* case.

Like the court in *Wilson*, the Missouri courts decided issues separate and distinct from the issues in *Aparicio*. The Supreme Court of Missouri in *Turpin v. Chicago, Burlington & Quincy Railroad Co.*, 403 S.W.2d 233 (Mo. 1966), for example, considered in the context of a directed verdict the issue of whether an employee was "employed" by the railroad company (and thus covered by FELA) as a result of being employed by the railroad's wholly-owned subsidiary trucking company. Applying reasoning similar to that of the Seventh Circuit in *Wilson*, the Missouri Supreme Court rejected the *Rogers* "slightest evidence" standard because the issue was not *employer negligence*, but rather the existence of employment. Therefore, the court applied traditional directed verdict analysis, and ultimately upheld the directed verdict for the railroad on the employment question. *Turpin*, 403 S.W.2d at 237-42.

In a later Missouri Court of Appeals case also cited by Ruiz, *Vinyard v. Missouri Pacific Railroad Co.*, 632 S.W.2d 272 (Mo. Ct. App. 1982), the court considered a nearly identical set of facts, that is, was an employee "employed" by the railroad company (and thus covered by FELA) as a result of being employed by the railroad's wholly-owned subsidiary trucking company. *Id.* at 274. Applying the same standards as the *Turpin* court, the appellate court nevertheless found factual issues yet to be resolved by a jury, and therefore reversed the granting of a directed verdict. *Id.* at 274-77.

The two Missouri cases do not conflict with each other, except as to facts. The two courts applied the same legal analysis. Neither do these two cases conflict with the Seventh Circuit in *Wilson*. They all employed similar, traditional legal analyses. Finally, these three cases

do not conflict with the Sixth Circuit in *Aparicio*, as alleged by Ruiz, because the Aparicio court considered wholly separate and distinct issues, yet also applied a traditional judgment as a matter of law analysis.

Ruiz attempts to create conflict when none exists. This case is in complete harmony with all known cases that have construed and applied the law in the context of whether a FELA plaintiff is within or without the scope of his/her employment when injured. There being no conflict, especially with respect to the specific issue decided in the case at bar, between the decision of any court and the Utah courts below, there is no compelling reason for this Court to grant certiorari to once again review this issue.

II.

PETITIONER'S ARGUMENT THAT A FELA PLAINTIFF'S EMPLOYMENT STATUS IS GENERALLY A QUESTION FOR THE JURY IS MISLEADING AND MERITLESS.

A FELA plaintiff's employment status is not necessarily a question for the jury. Instead, each case must be analyzed on its own facts. Plaintiff's argument to the contrary is overbroad, unfounded and misleading.

Ruiz states in oversweeping terms in his petition that "[t]his Court long ago determined that the issue of whether a railroad worker was employed in commerce is generally for the jury." (Pet. at 9.) To support that broad proposition, Ruiz cites to this Court's opinions in *North Carolina Railroad Co. v. Zachary,* 232 U.S. 248 (1914), and

New York Central & Hudson River Railroad Co. v. Carr, 238 U.S. 260 (1915). However, Ruiz's misleading proposition finds no support in these opinions from this Court.

The *Zachary* Court considered the issue of whether a railroad employee was "employed in commerce" at the time of an accident which took the employee's life, so as to bring the employee within the FELA. The Court determined that the evidence was conflicting, and that therefore the issue should have gone to the jury. *Zachary*, 232 U.S. at 258-61. The *Zachary* Court made no sweeping statements to support Ruiz's proposition. Nor did the Court state, or imply, that each factual scenario would result in the same outcome. The Court simply applied the traditional summary judgment analysis, found material facts in dispute, and remanded the issue for jury resolution. The *Carr* Court considered a similar issue, and, citing to *Zachary*, affirmed judgment for the plaintiff. *Carr*, 238 U.S. at 261-64. Again, no sweeping statements exist within the text of *Carr* to support Ruiz's overreaching proposition.

Neither case states, or implies, that the scope of employment issue always is for the jury. If relevant facts are in dispute, then the dispute is resolved by the trier of fact. If the facts are not in dispute and do not reasonably support a finding on this necessary element of the plaintiff's case, then the question may properly be kept from the trier of fact. At their broadest, these cases merely support traditional summary judgment analysis and the general proposition that the trier of fact resolves genuine issues as to material facts. Indeed the other cases cited by Ruiz,as well as other authority as discussed in the preceding point, all refute the broad conclusion Ruiz asks this Court to make.

Ruiz's argument on this issue is without merit. Ruiz misleads the Court by citing to cases which do not support, even by inference, Ruiz's broad proposition. Again, this Court has been given no compelling reason to grant certiorari.

III.
RUIZ ONLY WANTS ANOTHER CHANCE TO REARGUE HIS CASE.

This Court has expressly indicated that it does not routinely review questions of fact. Sup. Ct. R. 10. *See also NLRB v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) ("[W]e are presented primarily with a question of fact, which does not merit Court review."); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) ("[U]ltimate facts are subject to the 'clearly erroneous' rule, and their review would be of no importance save to the litigants themselves. The appropriate disposition in such a situation is to dismiss the writ as improvidently granted."). And even when a petition for certiorari is granted, this Court has refused to review the factual findings below. *United States v. Johnston*, 268 U.S. 220, 227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts."). Such a refusal to review factual findings is consistent with the Court's desire to review those cases that are important not just to the parties themselves, but to the public as a whole. *See Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955)("[I]t is important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ."). In addition to not reviewing factual findings below, this Court's own recently amended rules also state that a "petition . . . is

rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Despite Ruiz's attempt to create conflicts where none exist, in the end Ruiz simply requests that this Court grant certiorari to review the facts and then reconsider his legal arguments regarding how the facts of record support his contention rather than the trial court's and Utah Court of Appeals' conclusions. The facts are undisputed, and the general principles of law are undisputed.

Ruiz merely interprets the facts and law differently than Southern Pacific, the trial court and the Utah Court of Appeals.[4]

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[4]In his arguments below Ruiz construed the evidence of record differently than Southern Pacific, the trial court and the Utah Court of Appeals. Hence, he most likely will argue again before this Court that his version of the facts and law are correct. Indeed, Ruiz states in his petition:

> In any event in this case, unlike the two cited cases, there were disputed factual issues....
>
> Despite the evidence as to the disputed facts, the Utah Court of Appeals held that "[t]he undisputed facts show that Ruiz was not within the scope of employment in furtherance of interstate commerce at the time of his accident."

(Pet. at 14-15.) Ruiz was making reference to the Collective Bargaining Agreement between Southern Pacific and Ruiz's union that was before the trial court and the court of appeals. Ruiz argued that agreement required Southern Pacific to pay Ruiz for his time while he was driving his car to the worksite. The trial court and court of appeals rejected Ruiz's interpretation of the agreement. The Utah Court of Appeals stated:

> Rule 30 of the Collective Bargaining Agreement provides, however, that "[e]mployees shall not be allowed time while traveling . . . between their homes and designated assembling points, or for other personal reasons." Thus, because Ruiz was traveling in his own vehicle for personal reasons, he was not entitled to pay.

(Pet., App. at A-10.) Moreover, even if the fact that Ruiz was not entitled to pay at the

Interestingly, no prior court has had occasion to apply the general, and well established, legal principles applicable to this case to facts similar to the unique facts of this case. Thus, this case follows no precise precedent and it likely will not set any precedent that would be expressly applicable to any other case.

If certiorari is granted, this Court will merely be required to apply its own analysis of the same legal principles applied by the Utah courts below to the same undisputed facts of record. There is no reason for this Court to grant certiorari simply to reconsider Ruiz's arguments that have consistently been rejected. A grant of certiorari would waste this Court's finite resources and preclude it from utilizing its time elsewhere. Therefore, Ruiz's petition should be denied.

IV.

THE DECISIONS BELOW WERE DECIDED CORRECTLY, AND THUS ANY REVIEW BY THIS COURT WOULD RESULT IN THE SAME OUTCOME.

The Utah courts below correctly considered the issue of whether or not Ruiz was acting within the scope of his employment when he was injured. They found no factual dispute and ruled, as a matter of law, that Ruiz was not acting within the scope of his employment when

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time he was injured was disputable, it is not material. Railroad employees have been determined to be outside the scope of their employment when they are pursuing their own interests beyond the supervision of their employer even when entitled to pay as a contractual benefit of their employment. *See Fowler v. Seaboard Coastline R.R.*, 638 F.2d 17 (5th Cir. 1981). Thus, Ruiz's interpretation of the facts and law clearly is misplaced, and his request to be able to have an opportunity to express his erroneous and irrelevant views to this Court should be rejected. (*See also, infra*, App. at 12a-13a.)

he was injured.

The issue of when an employee such as Ruiz acts inside or outside the course of his/her employment has arisen under varying factual circumstances. As Southern Pacific presented to the courts below, most analogous to the facts of this case is the line of cases commonly referred to as "commuter cases." These cases generally involve the factual situation of an employee traveling under his own volition and control, without his employer's supervision, to or from work by means chosen by the employee without employer compulsion. The courts confronted with this factual scenario consistently have held that the employee is outside the scope of his or her employment. *E.g.*, *Rogers v. Chicago & North Western Transp.*, 947 F.2d 837 (7th Cir. 1991); *Fowler v. Seaboard Coastline R.R.*, 638 F.2d 17 (5th Cir. 1981); *Metropolitan Coal Co. v. Johnson*, 265 F.2d 173 (1st Cir. 1959); *Atchison, T. & S.F. Ry. v. Wottle*, 193 F.2d 628 (10th Cir. 1952); *Quirk v. New York, C. & St. L. R.R.*, 189 F.2d 97 (7th Cir. 1951), *cert. denied*, 342 U.S. 871 (1951); *Sassaman v. Pennsylvania R.R.*, 144 F.2d 950 (3rd Cir. 1944).

The common factors which provided the foundation for these courts' decisions are: 1) the employee's exercise of his or her own choice in mode of travel; and 2) the employer's lack of control over the employee or the risks the employee may take in getting to or from work. A review of the decisions of the Utah courts below reveals that those courts properly considered these factors in accordance with FELA precedence. (R. at 429, 437; Pet., App. at A-9 to -11.)

Ruiz voluntarily rejected going with defendant to the place

where he was to work on the day of the accident, although Ruiz had the opportunity to do so and in fact customarily had submitted himself to the control and supervision of Southern Pacific on previous occasions in getting to the work site. Ruiz elected to go to the work site by himself in his own automobile for his own personal reason of facilitating his earlier arrival at home for the weekend. He chose to drive for his own benefit.

Additionally, because Ruiz chose not to start his work at the work camp with his gang and go with them in Southern Pacific's truck, under Southern Pacific's control, to the work site, Southern Pacific had no control over when, or if, Ruiz would leave the camp site or arrive at the work site to report for duty. Consequently, Southern Pacific had no control over Ruiz's conduct (*e.g.*, whether he would wear his seat belt), Ruiz's car, (*e.g.*,whether it was properly maintained), or Ruiz's use of his own car (*e.g.*, whether he would speed or drive recklessly). Southern Pacific did not compel Ruiz to drive his own car, and had no control over the risks Ruiz voluntarily took in getting to work that day.

These facts are not disputed. Based on these facts, the courts below were correct in granting summary judgment to Southern Pacific as a matter of law on the issue of whether Ruiz was acting within the scope of employment. Any review by this Court would result in the same outcome. If not, decades of applicable FELA precedence would be overturned. Thus, Ruiz's petition should be denied.

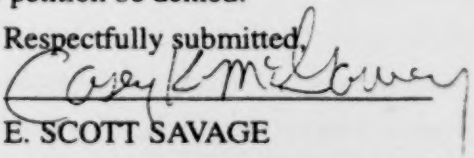
CONCLUSION

Ruiz is not without a right to seek legal recourse for his injuries

simply because his FELA action has properly been dismissed. Ruiz still can pursue his pending common law negligence action against Southern Pacific. Ruiz has informed this Court that he has a severe head injury that renders him mentally incompetent. That alleged fact, even if true, has no relevance to the arguments Ruiz makes in his petition. It apparently has been asserted only to incite sympathy. This Court should not grant certiorari out of sympathy, especially where Ruiz continues to have a viable cause of action against Southern Pacific.

The Utah courts below correctly decided that as a matter of law, upon the record before them, Ruiz was injured while acting outside the scope of his employment for purposes of maintaining a FELA cause of action. The courts below correctly applied the traditional summary judgment standard and analysis, in conformity with Utah law and federal precedence. The decisions below do not conflict with any decisions of this Court or any other court. Those decisions also are correct in light of applicable legal principles and FELA case authority. Ruiz's arguments are misplaced and incorrect. He only seeks another chance to reargue his case before this Court. Southern Pacific, therefore, requests that the petition be denied.

Respectfully submitted,



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APPENDIX A

IN THE UTAH SUPREME COURT

JOSE RUIZ,	)	
Plaintiff/Petitioner	)	Appellate Court No.
vs.	)	940661-CA
SOUTHERN PACIFIC	)	District Court No. 910900648
TRANSPORTATION	)	(Priority No. 15)
COMPANY,	)	
Defendant/Respondent.	)	

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEALS [Dated March 29,1996]

An Appeal from the Second District Court
Weber County
Judge Michael D. Lyon

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ARGUMENT

Plaintiff contends that the "special and important reason" for the issuance of a writ in this case is to correct a "conflict with decisions of the United States Supreme Court and decisions of this Court." (Plaintiff's petition, pages 4, 11, 13, 15 and 17). However, Plaintiff has not demonstrated that there is any inconsistency with or departure from controlling law. Indeed, the decision of the Court of Appeals is in complete harmony with all federal and state cases that have considered when an employee has acted within the course of his employment under the FELA. Therefore, Plaintiff's contention is erroneous. There is no reason for this Court to allow Plaintiff a third opportunity merely to reargue his position.

POINT I
PLAINTIFF HAS NOT CITED TO ANY DECISION OF THIS COURT THAT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS.

Plaintiff has cited throughout his petition to eight decisions rendered by this Court. In none of them did this Court hold that under facts similar to the undisputed facts before the Court of Appeals that a railroad employee was acting within the course of his employment for purposes of coming under the coverage of the FELA. None of those cases even involved this specific issue or the FELA.[2] Moreover, it is

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[2] *Birkner v. Salt Lake County*, 771 P.2d 1053, 1056-59 (Utah 1989)("the issue was whether improper sexual contact between a therapist and a patient falls within the scope of the therapist's employment" under the doctrine of respondeat superior, and this Court held it did not as a matter of law); *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1038, 1040-43 (Utah 1991)(under the doctrine of respondeat superior, where the

significant that six of these eight cases where not cited by Plaintiff in his briefs to the Court of Appeals.[3] The two that were cited by Plaintiff,

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primary motivation of an employee's activity is personal and that activity is a substantial diversion from the employee's duties so as to constitute an abandonment of employment, that employee, as a matter of law, will be held to be acting outside the scope of employment, but in this particular case this Court found that "[m]any of the facts underlying Clover's claims are in dispute" precluding summary disposition); *Martinson v. W-M Insurance Agency, Inc.*, 606 P.2d 256, 258 (Utah 1980)(in affirming the denial of compensation under the Utah Worker's Compensation Act to an insurance salesman injured in an automobile accident, this Court stated that "if the predominate motivation and purpose of the activity is in serving the social aspect, or other personal diversion of the employee, even though there may be some transaction of business or performance of duty merely incidental or adjunctive thereto, the person should not be deemed to be in the course of his employment"); *Park Utah Consolidated Mines Co. v. Industrial Comm'n*, 103 Utah 64, 133 P.2d 314, 317 (1943)(in a workmen's compensation case, this Court confirmed the "rule that there can be no workmen's compensation for an accident sustained going to or from work" because of the fact that the employee selects "the particular way, means and conveyance for going to and from work," but where the "means for entrance [to his employment] are limited so that he has no choice as to the mode of entrance, all of the hazards which are peculiar to such entrance attach to his employment"); *Soldier Creek Coal Co. v. Bailey*, 709 P.2d 1165 (Utah 1985)(in a workmen's compensation case, this Court held as a matter of law that an employee's death did not arise out of or in the course of his employment, for purposes of considering the applicability of the Utah Worker's Compensation Act, where the employee was thrown from his own automobile while he was driving to work, specifically holding that exceptions to this going-to-and-from work rule recognized in workmen's compensation cases did not apply upon the undisputed facts); *State Insurance Fund v. Industrial Comm'n*, 15 Utah 2d 353, 393 P.2d 397 (1964)(this Court affirmed an order awarding workmen's compensation benefits where the employee was held to be within the course of his employment because he was travelling from one office where he already had began his work to another office where he would continue his work). See also Bountiful Brick Co. v. Giles, 68 Utah 600, 251 P. 555 (1926), aff'd, 276 U.S. 155 (1928) and Cudahy Packing Co. v. Parramore, 60 Utah 161, 207 P. 148 (1922), aff'd, 263 U.S. 418 (1923), both of which are discussed in Footnote 4.

[3] This is significant because in order to preserve a plea of error the alleged error must have been raised below in order to allow that court to correct any error, if error there be. *Utah County v. Brown*, 672 P.2d 83 (Utah 1983). *Cf. Warburton v. Virginia Beach Federal Sav. & Loan Ass'n*, 899 P.2d 779 (Utah App. 1995) (argument not raised at trial cannot be raised on appeal).

Bountiful Brick Co. v. Giles, 68 Utah 600, 251 P. 555 (1926), aff'd, 276 U.S. 154 (1928) and *Cudahy Packing Co. v. Parramore*, 60 Utah 161, 207 P. 148 (1922), aff'd, 263 U.S. 418 (1923), also are not on point and of no significance.[4] Regardless of what plaintiff represents in his written argument to this Court, the truth is that no Utah Supreme Court decision conflicts with the decision of the Court of Appeals in this case. Plaintiff's request should not be granted for this reason.

POINT II
PLAINTIFF HAS NOT CITED TO ANY DECISION OF THE UNITED STATES SUPREME COURT THAT CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS.

Plaintiff also has cited throughout his petition to five Supreme Court cases in addition to the Bountiful Brick and Cudahy Packing cases discussed in Point I. Three of those cases also were not cited by

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[4] In both of these cases, the imposition of liability under the Utah Workmen's Compensation Act was affirmed because there was found to be a "causal connection" between the injury and the employment. 276 U.S. at 158; 263 U.S. at 423-24. In both cases, the employee was killed while crossing over railroad tracks adjacent to their work places which they necessarily had to cross in order to get to where they needed to be to perform their duties for their employers. Hence, although only a "causal connection" between the injury and the employment was held to be sufficient under the state worker's compensation act, the analysis still required, as do the FELA cases discussed hereafter, that the injury resulted from a risk that the employee necessarily had to take and not a risk the employee chose to, but did not have to, take in order to perform his duties for his employer. 276 U.S. at 159 ("it was necessary for the employees, in order to get to the place of work, to cross the tracks, and they were in effect invited by the employer to do so"); 263 U.S. at 426 ("Parramore could not, at the point of the accident, select his way. He had no other choice than to go over the railway tracks in order to get to his work, and he was in effect invited by his employer to do so"). In the case at bar, Ruiz was invited, and in fact would have been paid, to travel to the work site with his gang in Defendant's truck, but he voluntarily chose to drive his own car instead, and forego any pay, for his personal reasons.

Plaintiff below, and they do not address the issue of when a railroad employee legally is deemed to be acting within the course of his employment for purposes of construing the applicability of the FELA[5] The two other cases merely support preliminary issues pertaining to the scope of the FELA and they also do not conflict with the holding of the Court of Appeals.[6] Again, the cases cited by Plaintiff do not support Plaintiff's contention that decisions from the United States Supreme Court conflict with the decision of the Court of Appeals in this case. There is no reason for this Court to grant Plaintiff's petition.

POINT III

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH APPLICABLE FELA CASE LAW.

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[5] Baker v. Texas & Pac. Ry, 359 U.S. 227 (1959)(held that a question of fact existed as to whether the plaintiff, a workman for a third party contractor, also was "employed" by the railroad within the meaning of the FELA; there was no dispute that the plaintiff was injured while performing his duties within the course of his employment for the third party contractor); Kelley v. Southern Pac. Co., 419 U.S. 318 (1974)(held that a person is deemed to be "employed" by a railroad under the FELA where there is a master-servant relationship, which requires a finding that the railroad exercises control over the person; there was no dispute that the plaintiff, if so "employed," was injured while performing his duties within the course of his employment for the trucking company for whom he worked); Ward v. Atlantic Coast Line RR, 362 U.S. 396 (1960)(held that a question of fact existed as to whether a railroad sectionman was an "employee" of the railroad for purposes of FELA coverage when he was working on a third party's track on his day off and was being paid by that third party; there was no dispute that the sectionman was injured while performing his duties in repairing the track of the third party).

[6] Chesapeake & Ohio Ry v. Kuhn, 284 U.S. 44 (1931)(the FELA is governed by common law as interpreted and applied in the federal courts, not state courts); Robinson v. Baltimore & Ohio RR, 237 U.S. 84 (1915)(in denying FELA coverage, it was held that a person employed by a third party was not "employed" by the railroad merely because his duties for his third party employer required him to work on a train; thus, "employee" and "employed" used in the FELA are "intended to describe the conventional relation of employer and employee").

The issue of when an employee acts inside or outside the course of his employment for purposes of construing FELA coverage has arisen under varying factual circumstances. Most analogous to the facts of the instant action are cases commonly referred to as "commuter cases." Commuter cases generally involve the factual situation of an employee travelling under his own volition, and without his employer's supervision, to or from his work site in a manner chosen by the employee without compulsion by the employer. In these cases, it is consistently held that employees are outside the course of their employment even if they are on their employer's property or riding in their employer's train or vehicle.[7]

The two common factors underlying the decisions in the commuter cases is the employee's exercise of his own choice in his mode of travel and the employer's lack of control over the employee or the risks the employee may take in getting to or from the work site. Applying these factors to the instant case compels the conclusion that the Court of Appeals properly affirmed summary judgment for Defendant. Ruiz voluntarily rejected going with the Defendant to the work site on the day of the accident, although Ruiz had the opportunity to do so and in fact customarily had submitted himself to the control

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[7] In chronological order, cases pertaining to employees travelling from a work cite include Young v. New York, New Haven & Hartford RR, 74 F.2d 251, 253 (2nd Cir. 1923), and 79 F.2d 844, 845 (2nd Cir. 1935); Sassaman v. Pennsylvania RR, 144 F.2d 950, 953 (3rd Cir. 1944); Quirk v. New York, Chicago, & St. Louis RR, 139 F.2d 97, 100-01 (7th Cir. 1951), cert. denied, 342 U.S. 871 (1951); Williams v. Norfolk S. Ry, 767 F. Supp. 756, 759 (E.D. Va. 1991), and cases pertaining to employees traveling to a work cite include Metropolitan Coal Co. v. Johnson, 265 F.2d 173, 178 (1st Cir. 1959); Spoonamore v. Louisville and Nashville RR, 179 F. Supp. 290, 292 (E.D. Ky. 1959); Getty v. Boston & Marine Corp., 505 F.2d 1226, 1228 (1st Cir. 1974); Thompson v. National Railroad Passenger Corp., 774 F. Supp. 1087, 1088 (N.D. Ill. 1991), aff'd, 966 F.2d 1457 (7th Cir. 1992). In all of these cases FELA coverage was denied.

and supervision of Defendant on previous occasions in getting to the work site. Plaintiff elected to go to the work site by himself in his own automobile for his own personal reason of having his car available to him to use in getting home from work earlier. In other words, he did not have to drive to the work site in his own car in order to do his work that day. He chose to drive for his own benefit.

In addition, because Plaintiff chose not to start his work at the work camp with his gang and go with them in Defendant's truck to the work site, Defendant had no control over when, or if, Plaintiff would leave the camp site or arrive at the work site to report for duty, nor did Defendant have any control over Plaintiff, the Plaintiff's car, or his use of his car. As further evidence in support of these factors, Plaintiff voluntarily chose not to be paid until he reported for duty at the work site.

This case falls squarely within the reasoning of the commuter cases that deny FELA coverage. Therefore, the Court of Appeals was correct in affirming summary judgment for Defendant as a matter of law.

POINT IV
THE FELA CASES RELIED UPON BY PLAINTIFF AREINAPPLICABLE ON THE UNDISPUTED FACTS OF THIS CASE.

Plaintiff does not deny the existence and affect of the line of FELA cases known as commuter cases. However, he emphasizes other lines of cases. These other lines of cases apply to other factual situations

that are inapplicable where an employee is travelling pursuant to his own choices and without the control or supervision of the employer to where he is to report for his work assignments. Plaintiff's cases, therefore, do not help Plaintiff on the facts of record before this Court.

One line of cases cited by Plaintiff pertains to the factual situation where an employee is injured at an employer provided work camp.[8] These cases are referred to herein as "work camp" cases. These work camp cases all involve negligence which occurred *at the camp* or *place* where the injured employee was required or encouraged by his employer to stay in order to rest and prepare to perform his work. The employers in these cases clearly had control over the camp facilities and/or benefitted from the employees staying at the work camps. These cases do not suggest that an employee who has left his work camp in his own vehicle and for his own personal agenda remains covered by the FELA while he operates his motor vehicle at any speed and in any manner of his own choosing, as did Ruiz.

The Tenth Circuit case of *Atchison, Topeka & Santa Fe Railway Co. v. Wottle*, 193 F.2d 628 (10th Cir. 1952) particularly is instructive on this point. In *Wottle*, a laborer, shortly after returning from the work site to his company provided camp site, left in his own automobile to

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[8] Plaintiff cited the following cases to the Court of Appeals and in his petition: *Chicago, Milwaukee, St. Paul & Pac. RR v. Kane*, 33 F.2d 866, 868 (9th Cir. 1929), *cert. denied*, 280 U.S. 588 (1929); *Mostyn v. Delaware, Lawanna & W. RR*, 160 F.2d 15, 17-18 (2nd Cir. 1947), *cert. denied*, 332 U.S. 770 (1947); *Casso v. Pennsylvania RR*, 219 F.2d 303, 305-06 (3rd Cir. 1955). Plaintiff now also cites, for the first time, the following two cases involving facts along this same line: *Baum v. Baltimore & Ohio RR*, 256 F.2d 753 (7th Cir. 1958); *Empey v. Grand Trunk W. RR*, 710 F. Supp. 653 (E.D. Mich. 1987). Interestingly, the *Baum* Court held that the employee, who was in the process of leaving the work camp at the time, was outside the course of this employment.

go buy groceries for himself. The laborer was killed while still on his employer's property when attempting to drive over the tracks. *Id.* at 630-31. The court in *Wottle* found that the laborer's own choice to drive his own car in pursuit of his own objectives was not a necessary incident to his employment so as to bring him within the coverage of the FELA. To rule otherwise, the court reasoned, would in effect mean that "there is no limitation upon the coverage [of the FELA] so long as there is a possibility that the employee will return to his work-a-day duties," and then stated, "[o]bviously, the legislation was not intended to go so far." Id. at 631. See also *Loya v. Denver & Rio Grande W. RR*, 993 F.2d 1551 (10th Cir. 1993)(unpublished opinion which is attached hereto); *Rogers v. Chicago & North W. Transp.*, 947 F.2d 837 (7th Cir. 1991); *Fowler v. Seaboard Coastline RR*, 638 F.2d 17 (5th Cir. 1981).

In the case at bar, Ruiz was not at the work camp or work site. He was not under the control or direction of Southern Pacific at the time. Defendant did not receive any benefit from Plaintiff's choosing to drive his own car to the work site so he could conveniently get home sooner for the weekend. Ruiz was injured while pursuing his own interests. Thus, the work camp cases relied upon by Plaintiff are inapplicable on the facts of this case.

Plaintiff also relies on a line of cases that pertain to the factual situation where an employee is injured on or near his employer's property in order to perform the specific job to which he is assigned. These cases are different from the commuter cases because the employee is injured after arriving at the general area where his work is to be performed, and it is found that the employee's being in the area in which he is injured was necessary in order for the employee to get to

precisely where he needed to be in order to accomplish his work.[9] These cases are referred to herein as "traversing the work site" cases. In all of these traversing the work site cases, as opposed to the commuter cases, the employee was not pursuing his own interest, nor was he exercising his own choice as to the means by which he got to or from the actual work site. Rather in these cases, the employee already had arrived at work and was required by his employer to go where the injury occurred as part of or in preparation for the performance of his duties. Clearly, what the employee was doing in these cases was for the benefit of his employer because it was necessary for the performance of his required duties.

These cases provide no help to Plaintiff under the facts of record. Ruiz had not yet arrived at the work site before he drove his car off of the road. He was 14 miles away from where he was to report to his supervisor and obtain his assignment for the day. He had not yet reported to work, and he was not traversing the work site to get to the exact location where he was to perform his duties for Defendant on that day.

The fact that Plaintiff was on Defendant's property at the time of his accident is not significant. The traversing the work site cases do not find the employee to be within his employment because he is on his employer's property. Many of the employees were on their employer's property in the commuter cases, discussed in Point III, and the employees in the *Wottle*, *Fowler* and *Rogers* cases, cited above in this

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[9] Plaintiff cited the following cases to the Court of Appeals and in his petition: Carter v. Union RR, 438 F.2d 208 (3rd Cir. 1971); Caillouette v. Baltimore & Ohio Chicago Terminal RR, 705 F.2d 243 (7th Cir. 1983).

point, were on their employer's property at the time of injury, yet they were found not to be within the course of their employment at the time. See also *Aldredge v. Baltimore & Ohio RR*, 20 F.2d 655, 658-60 (8th Cir. 1927), *cert. denied*, 275 U.S. 550 (1927); *Symonski v. Central RR*, 131 A. 628, 629-30 (N.J. 1926), aff'd, 135 A. 921 (1927).[10] Obviously, the very nature of the traversing the work site cases most likely will place the employee on his employer's property at the time of injury, and at least very close to where the employee's duties are to be performed. Nevertheless, whether or not an employee is on his employer's property is not a determinative factor in the analysis of whether the employee is within the course of his FELA employment at the time of injury.[11]

In the instant action, Ruiz had a safe way to get to the work site that was under the control of the Defendant. He could have travelled with the rest of his gang in Defendant's truck, as he had done prior to the accident, and had he done so on the day of the accident, Defendant could have assured his safety through, among other things, its maintenance of the truck, control of the speed it was driven and required use of seat belts. However, Plaintiff chose to pursue his own interests. His choice was not necessary for him to perform his duties for Defendant

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[10] The only cases Plaintiff cites in opposition to this FELA authority are cases discussing Utah law construing the "going-to-and-from-work rule" and the "premises exception" to that rule as they are applied in state workmen's compensation cases. The FELA is not a workmen's compensation statute. Moreover, the United States Supreme Court clearly has held that the FELA is governed by common law interpreted by federal courts, not state courts. Chesapeake, Ohio Ry v. Kuhn, 284 U.S. 44 (1931). No FELA case law supports Plaintiff's contention that is contrary to the FELA authority cited in the text.

[11] See also Restatement (Second) of Agency § 229 cmt. c (1958) ("the fact that the acts are done upon the master's premises or with his instrumentalities is . . . not conclusive").

any more than it would be for any commuter going to work. Plaintiff's FELA cases do not compel a determination different than the determination made by the Court of Appeals after it had carefully considered all these FELA cases on the issue before it.

POINT V
NO ERROR WAS COMMITTED IN AFFIRMING SUMMARY JUDGMENT.

Plaintiff suggests that because of the Union Agreement Plaintiff could not voluntarily take himself out of the course of his employment when he substituted personal transportation for company transportation, for personal reasons, and thereby removed himself from the control and supervision of his employer. It is ludicrous for Plaintiff to argue that no matter what he did for personal reasons he could not remove himself from the course of his employment. The *Wottle*, *Loya*, *Rogers* and *Fowler* cases, cited above, expressly negate this argument.[12] There are no cases supporting Plaintiff's argument.

In addition, Plaintiff tries to argue that genuine issues of fact exist that were ignored by the Court of Appeals. In reality, Plaintiff simply is trying to create an issue of fact by arguing that the Union Agreement required Defendant to pay Plaintiff for the time he spent driving his own car to work, and that this fact supports the legal conclusion that Plaintiff was within the course of his employment. This straw-man argument fails because there is no competent evidence of record that the Union Agreement required that Plaintiff be paid for the

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12 See text, *supra*, at pp. 14-15 [8a-9a.]

time he spent driving his own car. The Union Agreement speaks for itself and expressly provides that employees will not be paid when travelling for personal reasons. (R. 369.) Moreover, even if Plaintiff was entitled to compensation under the Union Agreement, Plaintiff still would be outside the course of his employment. See Loya attached hereto. Hence, Plaintiff was outside the course of his employment regardless of whether or not the Union Agreement allowed Plaintiff to claim pay during his commute as a contractual benefit of his employment.

Contrary to Plaintiff's contentions of error, uncontroverted FELA authority supports finding an employee to be outside the course of his employment when he voluntarily chooses to commute to work in his own vehicle on his own schedule and for his own benefit, during which time he was not furthering his employer's business and was not under the control or direction of his employer. Summary judgment is completely in harmony with FELA principles and case law.